

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIARulemaking to Repeal Rule 63.2(b) of
Commission Rules of Practice and ProcedureRulemaking 02-01-010
(Filed January 9, 2002)**DECISION APPROVING AMENDMENT OF COMMISSION RULES OF
PRACTICE AND PROCEDURE TO REPEAL RULE 63.2(B)****1. Summary**

This decision adopts amendments to the Commission Rules of Practice and Procedure (Rules) to repeal Rule 63.2(b)¹ regarding automatic reassignment of the assigned Administrative Law Judge (ALJ) in ratesetting matters and to make minor related changes to Rules 63.2(c) and (d), as set forth in Appendix A. These amendments are as proposed in our above-captioned Order Instituting Rulemaking (OIR).

The repeal of Rule 63.2(b) will eliminate potential delays associated with reassignment of the ALJ in Commission ratesetting proceedings. The Commission will retain Rules 63.3 and 63.4 regarding unlimited peremptory

¹ All Rule references are to the Commission Rules of Practice and Procedure unless otherwise stated.

challenges of the ALJ² and petitions for reassignment of the ALJ for cause,³ respectively.

2. Background

On January 9, 2002, the Commission proposed the repeal of Rule 63.2(b) regarding automatic reassignment of the ALJ in ratesetting proceedings and minor amendments to Rule 63.2(c) and 63.2(d) to delete references to Rule 63.2(b). We noted that although the Commission adopted Rule 63.2(b) in 1997 as part of its rules to implement Senate Bill (SB) 960 (Leonard, Stats. 1996, Ch. 96-0856), the Commission is not legally required to permit petitions for the automatic reassignment of the ALJ in ratesetting cases.⁴

As noted in the OIR, since the adoption of Rule 63.2(b), the Commission's caseload has become more complex, in significant part because of California's energy crisis. The Commission must therefore process cases more quickly and efficiently to address the energy crisis and to meet deadlines for the completion of decisions as required by SB 960. At the same time, the Commission must maintain all of its programs for industries and activities regulated under the

² Rule 63.3 permits unlimited petitions for reassignment of the assigned ALJ by any party in adjudicatory and ratesetting proceedings if the ALJ has (1) within the past 12 months served in an advocacy position at the Commission or has been employed by a regulated public utility; (2) has served in a representative capacity in the proceeding, or (3) has been a party to the proceeding.

³ Rule 63.4 permits unlimited challenges of the assigned ALJ for cause in any ratesetting, adjudicatory, or legislative proceeding if the ALJ has a financial interest in the proceeding or a party to the proceeding, or has bias, prejudice, or interest in the proceeding.

⁴ Decision (D.) 97-12-043; Pub. Util. Code § 1701.3. In contrast, under SB 960, the Commission is required to permit petitions for the automatic reassignment of the ALJ in adjudicatory cases. D.97-12-043; Pub. Util. Code § 1701.2.

Public Utilities Code. In addition, the Commission has a limited number of ALJs available, and this number is further constrained because of the hiring freeze imposed by Executive Order D-48-01.⁵

We therefore proposed the repeal of Rule 63.2(b) to eliminate the delays and disruption of proceedings associated with the automatic reassignment of the ALJ in ratesetting matters. We reasoned that parties would still receive a fair hearing before an impartial ALJ because of the availability of unlimited peremptory petitions for reassignment and petitions for reassignment for cause pursuant to Rules 63.3 and 63.4.

In order to give notice of our proposed repeal of Rule 63.2(b), we served the OIR on the service list for this proceeding, which generally includes persons interested in Commission procedural rulemakings, and forwarded a Notice of Proposed Regulatory Action (Notice) to the State Office of Administrative Law (OAL) for publication in the California Regulatory Notice Register. The OIR, the Notice, and a subsequent ALJ ruling specified dates by which interested persons could request a public hearing and could file and serve comments and reply comments. The Notice was published in the California Regulatory Notice Bulletin on February 1, 2002.

3. Discussion

The only written comments received on this rulemaking were from Pacific Gas and Electric Company (PG&E) and Southern California Edison Company

⁵ Executive Order D-48-01, signed by the Governor on October 23, 2001, prevents the Commission, like other state agencies, from hiring new staff until June 30, 2003. We therefore cannot replace ALJs who retire or leave employment with the Commission or fill vacant ALJ positions until that time, unless an exemption from the hiring freeze is obtained.

(Edison). There were no requests for a public hearing.⁶ Both Edison and PG&E oppose the repeal of Rule 63.2(b).

Edison contends that petitions for reassignment of the ALJ pursuant to Rule 63.3 and 63.4 will not ensure that parties in ratesetting proceedings receive a fair hearing before an unbiased ALJ. Edison correctly notes that Rule 63.3 applies only when the ALJ has an apparent conflict based on his/her past employment or previous status as a party or representative in the proceeding. Edison argues that parties may hesitate to request reassignment of the ALJ for cause, because of Rule 63.4's requirement that petitions for reassignment of the ALJ for cause be supported by a declaration that sets forth the specific basis for the petition. According to Edison, parties may be concerned that publicly stating the specific grounds for challenge of the assigned ALJ in a declaration will damage both the ALJ's reputation and the relationship between the party and the ALJ in future proceedings.

Edison also contends that the repeal of Rule 63.2(b) may cause an increased number of petitions for reassignment of the ALJ for cause pursuant to Rule 63.4, and that these petitions will further delay Commission proceedings. Edison notes that unlike petitions for automatic reassignment of the ALJ pursuant to Rule 63.2(b), the Chief ALJ must spend additional time considering the challenged ALJ's response before ruling on the petition for reassignment for cause pursuant to Rule 63.4.⁷

⁶ The public comment period and the period within which interested persons may request a public hearing have expired.

⁷ Rule 63.4(c)

PG&E also argues that it is especially important to provide for automatic reassignment of the ALJ in ratesetting proceedings, because most of the Commission's "high-stakes" or controversial cases are categorized as ratesetting under SB 960.

We believe that the available procedures to request reassignment of the ALJ pursuant to Rule 63.3 and 63.4 will more than adequately protect the right of parties to a fair hearing before an impartial ALJ in all proceedings, including "high-stakes" cases. While we appreciate Edison's concern for the reputation of the ALJ, we believe that it is appropriate to require parties to support petitions for reassignment for cause with declarations which state the specific reasons for the petitions, in order to avoid frivolous, baseless, or misinformed challenges of a particular ALJ or the filing of a significantly increased number of these petitions.⁸ In view of the number and complexity of ratesetting proceedings that the Commission must process and the limited number of ALJs, the Commission does not have sufficient time or resources to permit challenges of an ALJ without particular grounds. The Chief ALJ's consideration of the response of the ALJ to a petition for reassignment for cause will not substantially delay the Chief ALJ's ruling on the petition and subsequent processing of the case.

In response to Edison's concern that filing a petition for reassignment pursuant to Rule 63.4 will damage relationships between the party and the ALJ, petitions for reassignment of an ALJ, like challenges to a particular judge in the court system, are part of the litigation process. It is not uncommon in the

⁸ This requirement, along with Rule 63.4's requirement that the Chief ALJ consider the response of the assigned ALJ in ruling on a petition for reassignment for cause, should also protect the reputation of the assigned ALJ by discouraging parties from filing these petitions without good cause.

Commission proceedings for parties to express disagreement with a ruling or decision of the ALJ. For example, parties may, with certain exceptions, file comments on an ALJ's proposed decision,⁹ an appeal of an ALJ's presiding officer's decision,¹⁰ a petition for modification of an issued decision,¹¹ or an application for rehearing of a Commission order or decision.¹² In each of these instances, parties must specify the reasons that they believe the decision contains legal, factual, or technical errors. We have not observed any reluctance by parties to use these procedures when they disagree with a decision, even if they may again appear before the ALJ in another proceeding, or any concern that the exercise of these rights by parties has damaged relationships between parties and ALJs.

Moreover, under the California Code of Judicial Ethics,¹³ ALJs are required to perform their judicial duties impartially, without bias or prejudice,¹⁴ and must disqualify themselves from proceedings in which their disqualification is required by law.¹⁵ Rule 63.6 also requires ALJs to request reassignment and withdraw from a proceeding in which grounds exist for reassignment for cause,

⁹ Rule 77.2, see also Rules 77.6(f),(g)

¹⁰ Rule 8.2(c)

¹¹ Rule 47

¹² Rule 85

¹³ Under Government Code section 11475.20, ALJs are subject to most provisions of the Code of Judicial Ethics.

¹⁴ Canon 3.

¹⁵ Id.

unless the parties waive the right to reassignment pursuant to Rule 63.7.¹⁶

Therefore, in the unlikely event that an ALJ were to become biased or prejudiced against a party who had filed a petition for reassignment for cause, the ALJ would have an obligation under the Code of Judicial Ethics and Rule 63.6 to withdraw from the proceeding and request reassignment. We have no reason to doubt that ALJs will comply with these obligations and will continue to perform their duties in an ethical and professional manner.

PG&E also argues that the Commission has not received many petitions for reassignment pursuant to Rule 63.2(b), and that these petitions will cause only a slight delay in Commission proceedings. Edison similarly contends that the Commission is now under less pressure to process decisions quickly than during the height of the energy crisis. However, crises by their nature are unpredictable, and the Commission should take steps now order to meet the deadlines for completion of ratesetting proceedings imposed by SB 960 and to enhance its ability to process ratesetting matters promptly and efficiently.

Both Edison and PG&E propose that the Commission reduce delays by allowing parties five days, rather than 10 days, to petition for reassignment.¹⁷ Edison further suggests that the five-day period should begin upon the

¹⁶ Under Rule 63.7, the ALJ, after determining that there is a basis for his or her reassignment for cause, shall disclose the basis on the record, and may ask the parties whether they wish to waive the reassignment. A waiver of reassignment shall recite the basis in the record and is effective only when signed by all parties and included in the record.

¹⁷ Under this proposal, parties could file a first petition for reassignment of the ALJ pursuant to Rule 63.2(b) (petition) within five days of the notice of assignment and the second petition five days after the Chief ALJ's ruling on the first petition. Under Rule 63.2(b), only two petitions may be filed in each ratesetting proceeding.

publication of the notice of assignment in the Commission Daily Calendar and that the Commission notify the applicant and other interested parties of the ALJ assignment by e-mail. While this proposal would reduce some of the delay associated with reassignment of the ALJ pursuant to Rule 63.2(b), it does not address the effect of case reassignments on the Commission's management of its proceedings or on other ALJs who are already carrying large caseloads.¹⁸

Amendment of Rule 63.2(b) to permit parties to petition for automatic reassignment of the ALJ within a shorter time period also would not maximize the Commission's ability to process ratesetting decisions quickly and to use its staff resources effectively.

For all of the foregoing reasons, we repeal Rule 63.2(b) and make minor related amendments to Rule 63.2(c) and (d) as set forth in Appendix A.

4. Waiver of Review Period

Since the Commission has provided for public review and comment on this rulemaking pursuant to the Administrative Procedure Act (Gov't. Code § 11340 et seq.), the otherwise applicable 30-day period for public review and comment is waived pursuant to Rule 77.7(f)(8).

Findings of Fact

1. The repeal of Rule 63.2(b) will enable the Commission to reduce potential delay associated with the automatic reassignment of the ALJ in ratesetting proceedings and to process ratesetting decisions more quickly and efficiently.

¹⁸ Under this proposal, the Commission's ALJ management would still need to spend time identifying other ALJ's to whom the cases could be reassigned, making the reassignments, and reallocating case priorities within the ALJ Division. The ALJs to whom the cases are reassigned must then re-prioritize their workloads, which may cause additional delay in Commission proceedings.

2. The repeal of Rule 63.2(b) will not deny parties in ratesetting proceedings the right to a fair hearing before an impartial ALJ.

3. The amendments to Rule 63.2 adopted in this decision have been previously served on persons generally interested in Commission procedural rulemakings, published in the California Regulatory Notice Bulletin, and made subject to public comment.

Conclusions of Law

1. The Commission is not legally required to permit petitions for automatic reassignment of the ALJ in ratesetting proceedings.

2. The Commission has complied with all procedural requirements for the repeal of Rule 63.2(b) and the adoption of minor related amendments to Rule 63.2(c) and (d), as set forth in Appendix A.

O R D E R

IT IS ORDERED that:

1. The amendments to Rule 63.2 of the Commission Rules of Practice and Procedure (Rules), as set forth in Appendix A, including repeal of Rule 63.2(b) and minor amendments to Rule 63.2(c) and (d) are adopted.

2. The Executive Director and Chief Administrative Law Judge shall take all necessary action to submit the amendments to Rule 63.2, as set forth in Appendix A, to the Office of Administrative Law and may make format

changes as appropriate for printing newly amended Rule 63.2 in the California Code of Regulations.

This order is effective today.

Dated _____, at San Francisco, California

[Attachment to R0201010](#)